(1995) 07 BOM CK 0024

In the Bombay High Court

Case No : Criminal Miscellaneous Application No. 25 of 1995

Reliance Beach Inn Ltd. and others — APPELLANT

Vs

Margaret Mascarenhas and another — RESPONDENT

Date of Decision : 07-07-1995

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (1998) 91 CompCas 681

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : R.G. Ramani, for the Appellant; Smt. A. Agni, for the Respondent

Judgement

T.K. Chandrashekhara Das J.

1. A private criminal complaint as No. 21/OA/1994/D was filed in the Court of the judicial Magistrate, First Class, Panaji, by the first respondent against the petitioners in this criminal miscellaneous application u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter called "the Act"). In the complaint filed before the magistrate, the first respondent has stated that the first petitioner is a company and the second petitioner is the director of that company, in charge and responsible for the company and the third petitioner is the financial adviser to the company. It is further alleged in the complaint that the first petitioner had executed an agreement dated December 2, 1993, for sale of certain property described in the agreement there to whereby petitioner No. 1 was represented by the second petitioner. In pursuance of the agreement between the parties, it is alleged that the first petitioner-company paid Rs. 1,00,000 through cheque bearing No. 22697 drawn on the Goa Urban Co-operative Bank Ltd., St. Inez, Panaji, dated December 31, 1993, signed by petitioner No. 3 as financial adviser of petitioner No. 1 for valid consideration. It is further alleged that the cheque was dishonoured with a remark that "payment stopped by the drawer". A statutory notice was issued as required u/s 138 of the Act by the first respondent to the petitioners but no reply was sent by them. Ultimately, the first respondent

has filed the aforesaid complaint against the petitioners. The magistrate, after taking the statement of the first respondent, took cognizance of the complaint and issued process to the petitioners. The petitioners have approached this court u/s 482 of the Criminal Procedure Code, 1973, to challenge the action of the magistrate having taken cognizance of the offence against them.

2. Mr. Ramani, learned counsel appearing for the petitioners, submits that the necessary ingredients required for taking cognizance of the offence u/s 138 of the Act have not been made out warranting issuance of process against the petitioners. He elaborated his argument by submitting that merely "payment stopped by the drawer" will not give a cause of action to the first respondent to maintain a complaint u/s 138 of the Negotiable Instruments Act, 1881. He submits that in order to take cognizance of the offence, as per the provisions of section 138 of the Negotiable Instruments Act, essentially there must be pleadings to the effect that the cheque was dishonoured for insufficient funds and materials prima facie to support those pleadings. Unless these two essential ingredients, namely, the pleadings and the material to support the pleadings, are before the magistrate, the magistrate cannot take cognizance of the complaint u/s 138. He submits that neither the complaint nor any materials including the complainant''s statement taken before the magistrate disclose these two materials warranting the issue of process to the petitioners u/s 138 of the Negotiable Instruments Act. In support of his contention, he cited two decisions of the Kerala High Court. In Ashok v. Vasudevan Moosad [1993] 2 BC 143: [1995] 82 Comp Cas 665, the learned judge of the Kerala High Court has held that the ingredients of the offence u/s 138 will not be proved unless there is an allegation of insufficient funds. Mere endorsement to stop payment will not give the magistrate the power to issue process u/s 138 of the Negotiable Instruments Act. In another decision of Mohammed Rasheed v. State of Kerala [1994] 2 BC 30, a Division Bench of the Kerala High Court has held on more or less the same lines. It is held in para 9 as follows :

"Annexure ''B'', complaint, does not contain an allegation to the effect that the cheque was dishonoured due to insufficiency of funds in the account of the petitioner. The allegations therein are not capable of bringing out such a contention even by necessary implication. Therefore, annexure ''D'', complaint, and the proceedings thereunder are liable to be quashed."

3. Mrs. Agni, learned counsel appearing for the respondents, on the other hand, submitted that a breach of section 138 is a technical offence. It is sufficient if the complainant shows the court that a cheque has been issued which was dishonoured by the bank for whatever reason and a notice is followed as required u/s 138, then the magistrate will get jurisdiction to entertain that complaint u/s 138 of the Negotiable Instruments Act to issue process against the accused. She emphasised that the ground on which the cheque was dishonoured is immaterial. The only concern of the magistrate at the time of taking cognizance of the offence is whether there are materials to show that the cheque has been issued

and whether it has been dishonoured. To fortify her argument, she cited the decision of Rakesh Nemkumar Porwal Vs. Narayan Dhondu Joglekar, of the judgment is relevant for the purpose of our case. It reads as follows 78 Comp Cas 835 :

"A clear reading of section 138 leaves no doubt in our mind that the circumstances under which such dishonour takes place are required to be totally ignored. In this case, the law only takes note of the fact that the payment has not been forthcoming and it matters little that any of the manifold reasons may have caused that situation. If, for instance, the closure of an account or the stoppage of payment or any other of the common place reasons for dishonour were to be justifiable, then, the Legislature would have set these out in the section as exceptions not constituting an offence. No such intention can be read into section 138, as none exists. The solitary exception made by the Legislature is with regard to the drawer being offered a final opportunity of paying up the amount within 15 days from the receipt of notice which, in other words, provides a last opportunity to prove one''s bona fides. It is obvious that having regard to the widespread practice of issuing cheques which are dishonoured and the many ingenious methods of avoiding payment that are practiced, that the Legislature has opted for a no-nonsense situation. The possibility has not been overlooked whereby an account may inadvertently be overdrawn or a dishonour may be for technical reasons or where a genuine mistake has occurred and the grace period provided for by the Legislature after service of notice on the drawer is in order to afford an opportunity to the drawer to rectify these. Undoubtedly, even when the dishonour has taken place due to the dishonesty of the depositor, the drawer is still given a last chance to act otherwise. Consequently, the reasons for dishonour even if they be very valid as was sight to be pointed out in this case, should not and cannot be taken into account by a magistrate when such a complaint is presented."

4. It was made clear in the abovesaid paragraph by the Division Bench of this court that if the closure of account or stoppage of payment or any other reasons leading to dishonour were to be excluded from the clutches of section 138, the Legislature would have set out in that section an exception. In para. 25 of that judgment, it was further held that the wording and the endorsement from the bank or the circumstances under which a cheque is returned are not the guiding criteria but the fact that on presentation of the cheque, the payment was not made will be sufficient to take cognizance of offence u/s 138 of the Negotiable Instruments Act. In view of the conflicting decisions of the High Courts, I had to follow the decision of the Division Bench of this court, or rather, judicial discipline compelled me to follow the decision of this court. Following the aforesaid decision, the contention of Mr. Ramani has to be rejected. The magistrate can take cognizance of an offence u/s 138 of the Negotiable Instruments Act, if the complaint disclosed that a cheque has been issued and it has been dishonoured and a notice preceding the complaint was filed and if these 3 materials are there, the magistrate can take cognizance of an offence u/s 138 of the Negotiable

Instruments Act.

5. Mr. Ramani, counsel for the petitioner, further contended that there was no justification in implicating petitioners Nos. 1 and 2 in this complaint even though the complaint alleges that the cheque was issued on behalf or at the instance of petitioners Nos. 1 and 2. I fail to notice any materials to prima facie satisfy the magistrate to fasten the liability on petitioner Nos. 1 and 2 in this complaint. Mrs. Agni has tried to impress upon me that the allegations made in the complaint and the sworn statement made before the magistrate will be sufficient for imputing liability against petitioners Nos. 1 and 2. I cannot agree with this submission. In order to maintain a complaint, as I pointed out earlier, the essential materials before the magistrate required is a dishonoured cheque and a notice preceding the complaint. If any other materials are before the magistrate to connect petitioners Nos. 1 and 2 with the transaction in question, there may be some justification in implicating the petitioners also. I had the benefit of perusing the copy of the cheque issued by the third petitioner. I see that the cheque was issued in the personal capacity of the third petitioner. In any angle, it cannot be said that the cheque was issued for and on behalf of petitioners Nos. 1 and 2 or even at their instance. Therefore, the mere allegation made in the complaint and in the statement to fasten the liability on the persons other than the persons who drew the cheque will not be sufficient to issue a summons pursuant to a complaint made u/s 138 of the Negotiable Instruments Act.

6. In view of the above discussion, the criminal miscellaneous application is partly allowed. I direct the learned magistrate to delete the names of petitioners Nos. 1 and 2 from the proceedings and proceed with the case against petitioner No. 3 alone. With these observations, the criminal miscellaneous application is disposed of. There shall be no order as to costs.

